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NO. 82-1253

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY;
and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The arguments and authorities which follow are submitted, pursuant to Rule 22.5 of the

Rules of the Supreme Court of the United States, in reply to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari. Petitioners Solem and Meierhenry represent the State of South Dakota, and will hereinafter be referred to as "State." Respondent Bartlett will be referred to as "Bartlett." The Act of May 29, 1908, 35 Stat. 460, will hereinafter be referred to as "1908 Surplus Lands Act." References to the Petition for Writ of Certiorari, and the Respondent's Brief in Opposition to the Petition for Writ of Certiorari will be made by using the designation "Pet." and "Resp.," respectively, followed by the appropriate page number.

REASONS FOR GRANTING THE PETITION

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH A STATE COURT OF LAST RESORT.

A. Review by this Court is necessary to resolve the conflict between the South Dakota Supreme Court and the Court of Appeals.

Since 1973, there have been three decisions by the United States Court of Appeals for the Eighth Circuit and two decisions by the South Dakota Supreme Court involving the same question as is presented in this Petition. Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982) (en banc); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded, 446 U.S. 980 (1980); United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) [hereinafter referred to as "Erickson"]; State v. Janis, 317 N.W.2d 133 (S.D. 1982); Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977). The differences between these decisions are easily discernable: since 1973, the decisions by the Court of Appeals have uniformly held that Congress did not intend to diminish the Cheyenne River Reservation with the 1908 Surplus Lands Act; on the other hand, the South Dakota Supreme Court has uniformly held that the 1908 Surplus Lands Act diminished the Cheyenne River

Reservation, and that crimes committed on the lands opened to non-Indian settlement by that Act were within the criminal jurisdiction of the State of South Dakota. Bartlett, supra at 421; Dupris, supra at 320; Erickson, supra at 688-689; Janis, supra at 134-135; Stankey, supra at 127. Review by this Court is necessary to resolve this conflict.

Contrary to the claim made by Bartlett, the jurisdictional conflict presented in this Petition is one that is ripe for review by this Court. Bartlett suggests that the availability of habeas corpus relief, under 28 U.S.C. § 2254, is the answer to this problem. Resp. 6. The fact that there have been five decisions on the question presented in this Petition in the last ten years highlights the total lack of merit in such a claim. Until a decision is rendered by this Court, the jurisdictional problems, including "forum shopping" by Indian defendants, will continue.

The South Dakota Supreme Court has noted this problem on two different occasions and made the following observation:

> [Any confusion created by checkerboard jurisdiction] cannot compare with the confusion in determining criminal jurisdiction that has existed since Seymour [v. Superintendent, 368 U.S. 351, 83 S.Ct. 424, 7 L.Ed.2d 346 (1962)] with Indian defendants charged with a crime within the original boundaries of a reservation claiming federal jurisdiction if convicted in state courts and claiming state jurisdiction if convicted in federal courts.

Stankey, supra at 127. See also, Janis, supra at 134.

The procedural histories of the recent decisions dealing with the Cheyenne River Reservation support the South Dakota Supreme Court's concerns dealing with "forum shopping." One of these decisions, State v. Janis, supra, involved a two count complaint in state court charging Marvin Wayne Janis with second degree manslaughter. The charges arose from the killing of two people in an automobile accident which occurred on a highway in the area opened by the

1908 Surplus Lands Act. When he finally came before the state court on the complaint, Janis filed a Motion to Dismiss for want of state jurisdiction. After the state trial court granted this motion, the State was granted permission to pursue an intermediate appeal to the South Dakota Supreme Court.

In the meantime, Janis negotiated a plea agreement with the United States Attorney for the District of South Dakota in regard to the same incident. By pleading guilty to one count of involuntary manslaughter, a second count was dismissed. Janis then received a sentence of three years in the federal penitentiary. Interestingly, the United States Attorney for the District of South Dakota at that time is now Bartlett's counsel of record.

All of this federal activity took place after the Janis appeal had been briefed and argued in the South Dakota Supreme Court, but before a decision had been rendered by that court. In

fact, the State of South Dakota filed an amicus statement with the United States District Court asking for a delay in the plea and sentencing proceedings because of the pendency of the appeal in the South Dakota Supreme Court. The District Court ignored this request. A short time after the federal prosecution, the South Dakota Supreme Court reversed the state trial court's dismissal of the original state complaint against Janis.

Not only does this description of the federal prosecution of Marvin Wayne Janis differ significantly from Bartlett's description of the events (Resp. 6-7), but it also graphically illustrates the acute need for a decision by this Court interpreting the 1908 Surplus Lands Act which opened the Cheyenne River Reservation to settlement.

Resolution of the conflict between the interpretation of a Surplus Lands Act by the Court of Appeals and the South Dakota Supreme Court is

not without precedent. In DeCoteau v. District County Court, 420 U.S. 425 (1974), a conflict existed between the South Dakota Supreme Court and the United States Court of Appeals for the Eighth Circuit concerning the interpretation of an Act of Congress (Act of March 3, 1891, 26 Stat. 989), which opened reservation land within the Lake Traverse Reservation to settlement by non-Indians. In DeCoteau v. District County Court, 87 S.D. 555, 211 N.W.2d 843 (1973), the South Dakota Supreme Court held that the opening of the land to settlement diminished the reservation. In United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), the Court of Appeals reached the opposite conclusion. This Court granted certiorari to resolve the conflict, DeCoteau v. District County Court, 417 U.S. 929 (1974), and later affirmed the South Dakota Supreme Court's decision. DeCoteau, 420 U.S. at 449.

The same considerations which led to this Court's decision to resolve the conflict in regard to the opening of the Lake Traverse Reservation are present in this matter. Because the present conflict between the South Dakota Supreme Court and the Court of Appeals is ripe for consideration by this Court, the State's Petition should be granted.

The conflict between the state courts and the federal courts has been intensified by the South Dakota Supreme Court's critical view of the Eighth Circuit's decision in Erickson, which is the ground work upon which its decisions in Dupris and Bartlett are built. See, Janis, supra at 137; Stankey, supra at 119. In both Janis and Stankey, the South Dakota Supreme Court found the analysis used in Erickson to be faulty. This criticism was based on the fact that the Court of Appeals did not have available for review subsequent decisions by this Court in DeCoteau, supra, and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584

(1977), which had altered the legal analysis used in determining the proper interpretation of the various Surplus Lands Acts.

In both Janis and Stankey, the South Dakota Supreme Court supported its criticism with a detailed and exhaustive analysis of the 1908 Surplus Lands Act, the historical context surrounding the passage of the Act, the legislative history of the Act, and the subsequent administrative, executive, legislative and judicial actions relating to the Act. The thoughtful and well-reasoned opinions of not only the South Dakota Supreme Court in Janis and Stankey, but also United States District Judge Andrew Bogue's decision in United States v. A Juvenile, 453 F.Supp. 1171 (D.S.D. 1979), and Circuit Judge Theodore McMillian's dissent in Dupris, supra, which all conflict with the Eighth Circuit's opinions in Bartlett, Dupris and Erickson, deserve thcughtful and extensive review by this Court.

B. Jurisdictional status within the opened areas of the original Cheyenne River Reservation is an important question to all persons living within the affected areas.

Bartlett suggests that the jurisdictional status of the Cheyenne River Reservation is "important mostly to the Indians." Resp. 8. In reality, the jurisdictional status within the area of the original Cheyenne River Reservation opened to settlement by the 1908 Surplus Lands Act is important to anyone living on or near the original Reservation, especially as that status relates to effective and consistent law enforcement. Since 1973, the jurisdictional status of the opened area has been an unsolvable puzzle: jurisdiction seems to belong to any court other than the one in which the Indian defendant has been charged. Under such a system, neither federal nor state law enforcement officials can provide the type of law enforcement services demanded by both Indians and non-Indians living within the area

encompassing the original Cheyenne River Reservation.

Without a decision by this Court at this time, there will be no final resolution of the question presented in this Petition, thereby continuing the jurisdictional quagmire that presently exists within the original boundaries of the Cheyenne River Reservation. Bartlett argues, however, that even if certiorari is granted and this Court determines that Congress intended to diminish the original Cheyenne River Reservation, the jurisdictional nightmare on the Reservation will not be eliminated. Instead, Bartlett argues, the jurisdictional problems will continue because of the creation of so-called "checkerboard" jurisdiction. Resp. 10.

Under Bartlett's analysis, the imposition of "checkerboard" jurisdiction should be a negative factor in this Court's decision on whether or not

to grant certiorari review. He bases this conclusion on the assertion that "this Court condemned a like proposal [to impose "checkerboard" jurisdiction] in Seymour v. Superintendent, 368 U.S. 351 (1962)." Resp. 10.

It is true that this Court looks upon "checkerboard" jurisdiction with a certain amount of disfavor. See, Seymour, supra; Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976). However, this Court has not avoided review of a jurisdictional question simply because a decision could create "checkerboard" jurisdiction. See, DeCoteau, supra; Rosebud Sioux Tribe, supra; and Washington v. Yakima Indian Nation, 439 U.S. 463 (1979). Chief Justice Francis Dunn of the South Dakota Supreme Court assessed the inherent problems of "checkerboard" jurisdiction in Stankey v. Waddell, supra. After reviewing the problems with such jurisdiction, he concluded:

> The finality of where jurisdiction belongs far outweighs any problems of

> determining whether a crime was committed on Indian allotments or on deeded land. The latter is simply a matter of proof. Further, the Supreme Court's recent ruling in Rosebud, which also results in such checkerboard jurisdiction, appears to us to mean that when there is unmistakeable congressional intent to alter a reservation boundary and provide for Indian allotments in the opened area, checkerboard jurisdiction is a necessary product.

Stankey, supra at 127 (citations omitted.) "Checkerboard" jurisdiction should not be an issue in this Petition: if Congress intended to diminish the Cheyenne River Reservation with the passage of the 1908 Surplus Lands Act, then that intent should be paramount.

The importance of the question presented in this Petition is further heightened by the fact that the Court of Appeals' decision in Erickson, supra, reversed a settled legal determination, originally set forth in United States v. LaPlant, 200 F. 92 (D.S.D. 1911), which stated that South Dakota's state courts had criminal jurisdiction within the area of the original Cheyenne River

Reservation opened to settlement by the 1908 Surplus Lands Act. The first criticism of that settled rule came in Judge Lay's dissent in United States ex rel. Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970). Because of the break in the continuum of jurisdiction created by the Erickson decision, the question presented in this Petition is one of great importance to the State of South Dakota, the affected counties, the Cheyenne River and Standing Rock Sioux Tribes, and the general public living within the area in question. The jurisdictional question presented herein should be heard and decided by this Court.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals decision in this matter relies on the court's earlier decisions in Erickson, supra and Dupris, supra. The greatest reliance

is placed on Erickson. Erickson, however, was decided prior to this Court's decisions in Rosebud Sioux Tribe, supra, and DeCoteau, supra. The Court of Appeals' analysis in Erickson necessarily failed to properly examine the factors set forth in these more recent decisions of this Court dealing with the diminishment of Indian reservations.

Bartlett claims that several differences between the situation found in the opening of the Cheyenne River Reservation and the opening of the Rosebud Reservation, which was analyzed in Rosebud Sioux Tribe, supra, support the Court of Appeals' decision in this matter. Resp. 9-17. A close analysis of Bartlett's argument, however, shows that Bartlett is arguing that Rosebud Sioux Tribe, supra, was incorrectly decided by this Court.

One example that illustrates this point is Bartlett's reference to the State's reliance on the 1910 amendment (Act of February 17, 1910, 36

Stat. 196) to the 1908 Surplus Lands Act as support for the claim that the Erickson analysis was incomplete. Resp. 15. However, in Rosebud Sioux Tribe, this Court reviewed identical language, and concluded that the inclusion of the prohibition language supported the argument that the opened area was no longer reservation. This Court stated:

> [T]he most reasonable inference from the inclusion of this provision [concerning prohibition of intoxicants on surplus lands] is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," because not in the reservation.

Rosebud Sioux Tribe, 430 U.S. at 613. The Court of Appeals in Erickson did not even address this argument, Erickson, supra at 688-689. See also, 36 Stat. 196, 197 [Pet., Appendix L, pp. A94-95] (language of the 1910 amendments); 36 Stat. 448, 451 [Pet., Appendix J, p. A76] (language in the 1910 Act of Congress which opened the Rosebud Reservation).

Bartlett's attack of the State's review of the shortcomings and inconsistencies of the Court of Appeals' analysis in Erickson directly conflicts with this Court's decision in Rosebud Sioux Tribe. If Bartlett's argument is correct, the underlying principles in Rosebud Sioux Tribe are invalid. Bartlett's arguments, however, are not correct. On the contrary, the Court of Appeals has interpreted the 1908 Surplus Lands Act dealing with the Cheyenne River Reservation in a way which conflicts with this Court's decisions in DeCoteau and Rosebud Sioux Tribe. Review by this Court is necessary.

CONCLUSION

As the chief law enforcement officer of the State of South Dakota, the Attorney General is bound to uphold the Constitution and legal authority of the State of South Dakota. Because the Court of Appeals determination as to jurisdiction on the original Cheyenne River Reservation

is incorrect, and because the South Dakota Supreme Court has twice, within the last six years, issued a mandate to the State of South Dakota as to the proper scope of the State's jurisdiction within the area of the original Cheyenne River Reservation opened by the 1908 Surplus Lands Act, South Dakota law enforcement officials must consider the area in question to be within the criminal jurisdiction of the State of South Dakota. This position creates a conflict which can be resolved only by a decision of this Court. Certiorari review should be granted.

Based on the foregoing arguments and authorities, and on the arguments and authorities presented in the Petition for Writ of Certiorari, the Petitioners Herman S. Solem, Warden, South Dakota State Penitentiary, and Mark V. Meierhenry, Attorney General for the State of South Dakota, pray that their Petition for Writ of

Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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